

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

MICHAEL R. SCHMAHL, individually  
and as Personal Representative  
of the Estate of F. MAUREEN  
SCHMAHL; MARY BOYLE,  
individually; ANNE STRATTON,  
individually; JANIS WAGGONER,  
individually; JERRY SCHMAHL,  
individually; JAMES SCHMAHL,  
individually; and KATHY LAST,  
individually,

Plaintiffs,

v.

MACY'S DEPARTMENT STORES, INC.  
dba BON-MACY'S, a foreign  
corporation,

Defendants/Third-Party  
Plaintiff,

v.

PALOUSE MALL ASSOCIATES, LLC, a  
Washington Corporation,

Third-Party Defendant.

NO. CV-09-68-EFS

**ORDER GRANTING AND DENYING  
IN PART THIRD-PARTY  
DEFENDANT PALOUSE MALL'S  
MOTION FOR SUMMARY JUDGMENT  
(1) DISMISSING MACY'S BREACH  
OF CONTRACT CLAIM; AND (2)  
ENTERING JUDGMENT ON PALOUSE  
MALL'S COUNTERCLAIM;  
GRANTING AND DENYING IN PART  
MACY'S MOTION TO STRIKE  
PARAGRAPHS AND EXHIBITS TO  
DECLARATION OF KIM  
IMPECOVEN; AND GRANTING  
MACY'S MOTION FOR ORDER  
DETERMINING APPLICABLE STATE  
LAW**

On June 2, 2010, a hearing occurred in the above-captioned matter. Anamaria Gil appeared on behalf of Defendant Macy's Department Store ("Macy's"). Gerald Kobluk and Gregory J. Arpin appeared on behalf of Third-Party Defendant Palouse Mall Associates, LLC ("the Mall"). Before the Court was the Mall's Motion for Summary Judgment 1) Dismissing Macy's Breach of Contract Claim and 2) Entering Judgment on Palouse Mall's

CounterClaim (Ct. Rec. 30), and Macy's Motion to Strike Paragraphs and Exhibits to Declaration of Kim Impecoven (Ct. Rec. 38). Both motions were opposed. Also, before the Court, without oral argument, is Macy's opposed Motion for Order Determining Applicable State Law. (Ct. Rec. 62.) After reviewing the submitted material and relevant authority and hearing from counsel, the Court is fully informed and grants and denies in part the Mall's summary judgment motion, grants and denies in part Macy's motion to strike, and grants Macy's "state law" motion.

### I. Background

Macy's leases retail space in the Palouse Mall in Moscow, Idaho. Macy's and the Mall's relationship is governed by a lease agreement ("the Lease"). The Lease contained similar mutual indemnity provisions and dissimilar mutual insurance provisions. These provisions state:

31.1 Lessee [Macy's] will indemnify Lessor [Mall] and save it harmless from and against any and all claims, actions, damages, liability and expenses in connection with loss of life, personal injury, and/or damage to property arising from or out of any occurrence in, upon or at the leased premises, not due to the negligence of Lessor [Mall], its agents or employees, or arising out of the occupancy or use by Lessee [Macy's] of the leased premises or any part thereof, or occasioned by any act or omission of Lessee [Macy's], its agents, employees or concessionaires.

31.2 Lessor [Mall] will indemnify Lessee [Macy's] and save it harmless from and against any and all claims, actions, damages, liability and expense in connection with loss of life, personal injury, and/or damage to property arising from or out of any occurrence in or upon the Common Areas not due to the negligence of the Lessee [Macy's], its agents or employees, or occasioned by any act or omission of the Lessor [Mall], its agents or employees.

32.1 Lessee [Macy's] shall during the entire term, at Lessee's [Macy's] own cost and expense keep in force by advance payment of premiums, liability insurance in an amount of not less than One Million Dollars (\$1,000,000) for injury to or death of one or more than one person as a result of one occurrence . . . insuring Lessee [Macy's] and Lessor [Mall] against any

1 liability that may accrue against them or either of them on  
2 account of any occurrences in or about the premises during the  
3 term or in consequence of Lessee's [Macy's] occupancy of the  
4 premises and resulting in personal injury or death, said  
5 insurance to protect and indemnify Lessee [Macy's] and Lessor  
6 [Mall] not only against any and all such liability, but also  
7 against all loss, expense and damage of any and every sort and  
8 kind, including costs of investigation and attorney's fees and  
9 other costs of defense . . . .

10 32.2 Lessor [Mall] shall at its sole expense at all times  
11 during the term of this lease maintain or cause to be  
12 maintained, in full force and effect with a financially  
13 responsible insurance company or companies, comprehensive  
14 public liability insurance covering the Common Areas naming  
15 Lessee [Macy's] as an additional insured, including coverage  
16 for any accident resulting in personal injury to or death or  
17 any person, with limits of not less than Five Hundred Thousand  
18 Dollars (\$500,000) per person and One Million Dollars  
19 (\$1,000,000) per occurrence . . . . All such policies required  
20 of Lessor [Mall] hereunder shall name Lessee [Macy's] as an  
21 additional insured thereunder . . . .

22 (Underlining added.)

23 This Lease language is now in dispute because of the unfortunate  
24 fall, and death, of eighty-five-year-old Maureen Schmahl. On July 12,  
25 2007, Ms. Schmahl fell after tripping over an electrical cord that ran  
26 from one of Macy's displays located in the Mall's common area. Ms.  
Schmahl died two weeks later. Ms. Schmahl's estate filed this wrongful  
death action against Macy's. (Ct. Rec. 1.) Macy's in turn filed a third-  
party complaint against the Mall, alleging that the Mall breached 1)  
Lease paragraph 32.2 by failing to name Macy's as an additional insured<sup>1</sup>  
and 2) Lease paragraph 31.2 by failing to accept tender of the wrongful

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<sup>1</sup> It is undisputed that at the time of Ms. Schmahl's accident that  
Macy's was not named as an additional insured on the Mall's liability  
policy. One month after Ms. Schmahl's fall, Macy's was added to the  
Mall's commercial general liability policy as an additional insured.

1 death action. (Ct. Rec. 19.) In response, the Mall counterclaimed that  
2 Macy's breached the Lease by 1) failing to name the Mall as a named  
3 insured on Macy's general liability policy and 2) failing to hold the  
4 Mall harmless from the wrongful death claims.

## 5 **II. Macy's Motion to Strike**

6 Macy's moves to strike paragraph 5, 6, 8, and 9, as well as exhibits  
7 1 and 2, to Kim Impecoven's declaration. The Court rules as follows:

- 8 • Paragraph 5 contains a conclusory legal statement without facts  
9 proving personal knowledge. Therefore, paragraph 5 is stricken.
- 10 • Paragraph 8 is not stricken because Mr. Impecoven, as the  
11 Mall's insurance agent, is in the best position to know what  
12 insurance he would have procured upon the Mall's request.
- 13 • Paragraphs 6 and 9 and exhibits 1 and 2 are not stricken  
14 because they discuss what insurance coverages were available  
15 pre- and post-accident, thereby, allowing the Court to fully  
16 consider the Mall's arguments.

17 Accordingly, Macy's motion is granted and denied in part.

## 18 **IV. Summary Judgment Motion<sup>2</sup>**

19 The Mall seeks summary judgment in favor on Macy's breach of  
20 contract claims and its own contract counterclaims. As explained below,  
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22 <sup>2</sup> The Court considered the facts and all reasonable inferences  
23 therefrom as contained in the submissions and the parties' Joint  
24 Statement of Uncontroverted Facts (Ct. Rec. 48), in the light most  
25 favorable to Macy's, the party opposing the motion. *See United States v.*  
26 *Diebold, Inc.*, 369 U.S. 654, 655 (1972) (per curiam).

1 the Court grants the Mall summary judgment as to Macy's claim that the  
2 Mall breached indemnity provision paragraph 31.2, but denies the Mall  
3 summary judgment on Macy's breach of insurance provision paragraph 32.2  
4 claim and on the Mall's counterclaims.

5 **A. Summary Judgment Standard**

6 Summary judgment is appropriate if the "pleadings, the discovery and  
7 disclosure materials on file, and any affidavits show that there is no  
8 genuine issue as to any material fact and that the moving party is  
9 entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Once  
10 a party has moved for summary judgment, the opposing party must point to  
11 specific facts establishing that there is a genuine issue for trial.  
12 *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). If the nonmoving  
13 party fails to make such a showing for any of the elements essential to  
14 its case for which it bears the burden of proof, the trial court should  
15 grant the summary judgment motion. *Id.* at 322. "When the moving party  
16 has carried its burden of [showing that it is entitled to judgment as a  
17 matter of law], its opponent must do more than show that there is some  
18 metaphysical doubt as to material facts. In the language of [Rule 56],  
19 the nonmoving party must come forward with 'specific facts showing that  
20 there is a *genuine issue for trial.*'" *Matsushita Elec. Indus. Co. v.*  
21 *Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (citations omitted)  
22 (emphasis in original opinion).

23 When considering a motion for summary judgment, a court should not  
24 weigh the evidence or assess credibility; instead, "the evidence of the  
25 non-movant is to be believed, and all justifiable inferences are to be  
26 drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255

1 (1986). This does not mean that a court will accept as true assertions  
2 made by the non-moving party that are flatly contradicted by the record.  
3 *See Scott v. Harris*, 550 U.S. 372, 380 (2007) ("When opposing parties  
4 tell two different stories, one of which is blatantly contradicted by the  
5 record, so that no reasonable jury could believe it, a court should not  
6 adopt that version of the facts for purposes of ruling on a motion for  
7 summary judgment.")

8 **B. Contract Interpretation Standard<sup>3</sup>**

9 "The interpretation of a contract begins with the language of the  
10 contract itself." *Independence Lead Mines Co. v. Hecla Mining Co.*, 143  
11 Idaho 22, 26 (2006). And the interpretation of unambiguous contract terms  
12 is a question of law. *Harris v. State, ex. rel. Kempthorne*, 147 Idaho  
13 401, 405 (2009); *Knipschield v. CJ - Recreation, Inc.*, 74 Wn. App. 212,  
14 215 (1994). "The words used in a contract must be given their ordinary  
15 meaning unless context definition require otherwise." *Schauerman v. Hagg*,  
16 68 Wn.2d 868, 873 (1966). Fundamental rules of contract interpretation  
17 apply to indemnity agreements which are to be construed so as to carry  
18 out the parties' intent. *Delson Lumber Co. v. Wash. Escrow*, 16 Wn. App.  
19 546, 552 (1976).

20 **C. Macy's Breach of Contract Claims**

21 The Mall requests summary judgment in its favor on Macy's claims  
22 that the Mall breached the Lease by failing to name Macy's as an  
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24 <sup>3</sup> The parties disagree as to which state law, Idaho or Washington,  
25 governs the *contract*. Yet, both parties agree that this issue need not  
26 be resolved now because there are no significant differences between the  
states' contract interpretation laws.

1 additional insured and by failing to accept tender of the wrongful death  
2 action because 1) the Mall had no duty to indemnify Macy's for Macy's own  
3 negligence and 2), even if Macy's had been an additional insured on the  
4 Mall's insurance policy, the policy would not cover Macy's in the  
5 wrongful death suit. As explained below, the Court grants (indemnity -  
6 paragraph 31.2) and denies (insurance - paragraph 32.2) in part the  
7 Mall's request.

8 1. Interpreting the Indemnity and Insurance Provisions<sup>4</sup>

9 Initially, the Mall asks the Court to construe the insurance and  
10 indemnity provisions together so that the indemnity provisions' phrase,  
11 "not due to the negligence of [the other party]," applies to the  
12 insurance provisions, thereby having the effect of making each party  
13 responsible only for its own negligence. For the following four reasons,  
14 this requested interpretation is not reasonable.

15 First, the Lease provisions are organized by subject, not by each  
16 party's liability obligations. For instance, paragraph 31.1 identifies  
17 when Macy's must indemnify the Mall. Paragraph 31.1 is followed by  
18 paragraph 31.2, which sets forth the Mall's indemnity obligations, not  
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20 <sup>4</sup> The Mall's argument is based on the notion that Macy's is  
21 attempting to force the Mall to indemnify Macy's. However, Macy's is  
22 asking the Mall to step into the shoes of the insurance carrier that the  
23 Mall was obligated to procure on Macy's behalf, which is not an act of  
24 indemnification. The Court addresses the Mall's interpretation arguments  
25 in the light of the insurance obligations since this is not an indemnity  
26 issue.

1 by paragraph 32.1, which sets forth the Macy's insurance obligations.  
2 While paragraph 51.1 states that "headings of sections are for  
3 convenience of reference only and shall not be used to define, limit or  
4 construe any provision of this lease," it remains significant that the  
5 provisions in dispute are organized by subject, not by a party's  
6 liability obligations. The lack of immediate proximity between paragraph  
7 31.2 (Macy's duty to indemnify) and paragraph 32.1 (Macy's duty to  
8 insure) casts doubt on the Mall's assertion that the indemnity and  
9 insurance provisions are to be construed together.

10 Second, neither the insurance provisions nor the indemnity  
11 provisions reference each other.

12 Third, the terminology differences in the two insurance provisions  
13 demand a finding that they are not to be limited by the indemnity  
14 provision. For instance, paragraph 32.1 states that Macy's has the duty  
15 to obtain insurance for the purpose of "protect[ing] and indemnify[ing]  
16 [Macy's] and [the Mall] . . . ." In comparison, this language is absent  
17 from paragraph 32.2. Unlike the two insurance provisions, the language  
18 of the two indemnity provisions is largely identical. The parties'  
19 clearly intended the insurance provisions and the indemnity provisions  
20 to serve different purposes and did not intend for the insurance  
21 provisions to be construed in light of the indemnity provisions.

22 Lastly, the Mall impliedly admitted that its interpretation was not  
23 reasonable. In its Memorandum of Authorities, the Mall states:

24 Macy's contractual obligation here is to provide to the Mall  
25 the exact same coverage as Macy's itself has. Merely naming the  
26 Mall as an additional insured on the Macy's liability policy  
does not satisfy that contractual mandate, because, as  
discussed herein, as an additional insured the Mall would be



1 insured only for claims against it arising out of someone's  
2 negligence other than its own.

3 (Ct. Rec. 31 at 14.) The Mall implicitly states that Macy's was required  
4 to provide insurance for the Mall in cases where the Mall may be  
5 negligent. This argument is irreconcilable with the Mall's proposed  
6 interpretation that the indemnity and insurance provisions be read  
7 together, which would result in a finding that the parties are solely  
8 responsible for their own negligence.

9 For these reasons, the Court does not adopt the Mall's suggestion  
10 that the insurance and indemnity obligations are to be interpreted  
11 together, thereby limiting each party's liability to its own negligence.  
12 Rather, the indemnity provisions (paragraphs 31.1 and 31.2) and the  
13 insurance provisions (paragraphs 32.1 and 32.2) do not limit the reach  
14 of one another. The Mall's motion is denied in part.

15 2. Macy's Indemnity Claim

16 The Mall seeks summary judgment on Macy's claim that the Mall's  
17 failure to accept Macy's tender of the wrongful death action was a breach  
18 of Lease paragraph 31.2 (indemnity). The Mall argues that under  
19 paragraph 31.2 it had no duty to indemnify Macy's for Macy's own  
20 negligence. The Court agrees.

21 The indemnity provision states that the Mall must indemnify Macy's  
22 for claims arising out of the common areas, "not due to the negligence  
23 of [Macy's]." The wrongful death suit is solely against Macy's and the  
24 statute of limitations has expired; therefore, no other party may be  
25 joined to the wrongful death action. Thus, Macy's is the only party that  
26 can potentially be held liable. Under these circumstances, the Mall has  
no obligation under Lease paragraph 31.2 to indemnify Macy's.

1 Accordingly, summary judgment is entered in the Mall's favor relating to  
2 Macy's failure to indemnify claim; the Mall's motion is granted in part.

3       3.   Macy's Additional Insured Claim

4       The Mall also seeks summary judgment in its favor on Macy's claim  
5 that the Mall breached Lease paragraph 32.2 by not adding Macy's as an  
6 additional insured to the Mall's insurance policy on the grounds that  
7 Macy's suffered no resulting harm. It is undisputed that the Mall failed  
8 to add Macy's as an additional insured, but the Mall argues that, even  
9 if it had added Macy's as an additional insured, the provided insurance  
10 would not have provided coverage for the wrongful death purportedly  
11 caused by Macy's negligence.

12       In support for its position, the Mall provides copies of the  
13 insurance it procured after the alleged wrongful death in which it names  
14 Macy's as an additional insured. That policy indicates that the  
15 additional insured is covered only for "liability . . . caused, in whole  
16 or in part, by [the Mall's] acts or omissions . . . ." Thus, this  
17 policy, even if it has been in effect on the date of Ms. Schmahl's fall,  
18 would not provide coverage for the wrongful death damages if Macy's is  
19 found to be negligent.

20       Nonetheless, the Court finds that this post-incident insurance does  
21 not control. The focus rather is on what additional insured coverage was  
22 required by Lease paragraph 32.2. Paragraph 32.2 states, that the Mall  
23 was required to maintain "comprehensive public liability insurance  
24 covering the Common Areas naming [Macy's] as an additional insured . .  
25 . ." Paragraph 32.2 did not place a limitation on this coverage in the  
26 event that Macy's was the negligent party. Therefore, the Court finds

1 it was the parties' intent to have the Mall provide coverage for the  
2 Common Areas to itself and Macy's, regardless of fault. The alleged  
3 wrongful death occurred in the Mall's Common Area. Accordingly, the  
4 Court denies the Mall's request to enter summary judgment in its favor  
5 as to Macy's claim that the Mall breached paragraph 32.2.

6 3. Indemnification

7 The Mall also asserts that Macy's cannot recover from the Mall  
8 because Macy's indemnity obligation under Lease paragraph 31.1 prohibits  
9 involving the Mall in an action where only Macy's can be held liable.  
10 The Mall's argument fails.

11 Macy's claim that the Mall breached Lease paragraph 32.2 is based  
12 on the Mall's failure to name Macy's as an additional insured for the  
13 Common Areas. Macy's is not attempting to make the Mall liable in the  
14 wrongful death action, but rather is seeking recovery for the damages,  
15 including potential liability in the wrongful death action and attorney's  
16 fees and costs incurred to defend the wrongful death action, resulting  
17 from the Mall's failure to add Macy's as an additional insured as  
18 required by paragraph 32.2. The Mall cannot rely on the indemnification  
19 provision to excuse its breach of contract. *See Taylor v. Browning*, 129  
20 Idaho 483, 493-94 (1996) ("A party may not breach a contract and then  
21 rely on an indemnity provision to hold itself harmless.").

22 4. Summary

23 As stated above, the Mall's motion for summary judgment on Macy's  
24 claim that the Mall breached paragraph 31.2 (indemnity) is granted  
25 because the Mall did not have a duty to indemnify Macy's for its own  
26 negligence. However, the Mall's motion for summary judgment on Macy's  
claim that the Mall breached paragraph 32.2 (insurance) is denied.

1 **D. The Mall's Breach of Contract Counterclaims**

2 The Mall seeks summary judgment on its counterclaims that Macy's  
3 breached the Lease by 1) failing to indemnify the Mall and 2) not  
4 insuring the Mall.

5 1. Macy's Duty to Indemnify the Mall

6 As discussed above, Macy's has a duty under paragraph 31.1 to  
7 indemnify the Mall for claims not due to the Mall's negligence. This  
8 indemnification duty, however, does not extend to instances where Macy's  
9 seeks recovery for the Mall's own breach of the Lease. Macy's breach of  
10 paragraph 32.2 (insurance) claim is based on the Mall's failure to name  
11 Macy's as an additional insured; therefore, paragraph 31.1  
12 (indemnification) does not apply to limit Macy's breach of paragraph 32.2  
13 claim. Macy's may seek the damages resulting from the Mall's breach of  
14 paragraph 32.2. The Mall's motion is denied in part.

15 2. Macy's Duty to Insure the Mall

16 The Mall argues that the insurance which Macy's has obtained for  
17 itself and the Mall is inadequate under the Lease terms. The Court need  
18 not decide whether the insurance provided by Macy's is sufficient because  
19 the Mall has not alleged facts establishing that it has been harmed by  
20 the alleged insufficient insurance.

21 3. Summary

22 The Mall is denied summary judgment on its counterclaims.

23 **IV. Motion to Determine Applicable State Law**

24 Macy's asks the Court to determine the applicable state law for the  
25 underlying wrongful death action. As part of its request, Macy's submits  
26 that Idaho tort law should govern. Plaintiffs object, stating that  
Washington law should govern.

1 **A. Choice of Law Standard**

2 To determine the substantive law to apply in a diversity case, a  
3 federal court applies the forum state's choice of law rules. *Brewer v.*  
4 *Dodson Aviation*, 447 F. Supp. 2d 1166, 1175 (2006). Washington requires  
5 a valid conflict of law issue to engage in a choice of law discussion.  
6 *Rice v. Dow Chem. Co.*, 124 Wn.2d 205, 210 (1994). If a valid conflict of  
7 law exists, Washington has determined that choice of law issues are  
8 settled following a two-step process. *Zenaida-Garcia v. Recovery Sys.*  
9 *Tech.*, 128 Wn. App. 256, 260 (2005). First, a court looks at the contacts  
10 the parties and underlying claim have to the states, including "[1)] the  
11 place where the injury occurred, [2)] the place where the conduct causing  
12 the injury occurred, [3)] the domicile, residence nationality, place of  
13 incorporation and place of business of the parties, and [4)] the place  
14 where the relationship, if any, between the parties is centered." *Id.* "If  
15 the contacts are evenly balanced, the second step of the analysis  
16 involves an evaluation of the interests and public policies of the  
17 concerned states to determine which state has the greater interest in  
18 determination of the particular issue." *Id.* at 260-61.

19 **B. Conflict of Law**

20 Macy's points to four conflicting areas of law between Idaho and  
21 Washington. First, Idaho precludes a plaintiff's recovery if that  
22 plaintiff is more than 50 percent responsible for the injury. I.C. § 6-  
23 801. Washington law does not bar recovery if a plaintiff's attributable  
24 fault is more than 50 percent. RCW 4.22.005. Second, Washington and  
25 Idaho differ on the duty of care a landowner has to warn invitees.  
26 Compare *Brown v. Stevens Pass, Inc.*, 97 Wn. App. 519, 524 (1999)  
(recognizing no duty to warn invitees of open and obvious dangers), and

1 *Harrison v. Taylor*, 115 Idaho 588, 595 (1989) (retiring the "open and  
2 obvious danger doctrine" and adopting a duty of ordinary care to  
3 invitees). Third, collateral sources are treated differently in each  
4 state. Compare *Ciminski v. SCI Corp.*, 90 Wn.2d 802, 804 (1978) (stating  
5 that a plaintiff's award will not be reduced by collateral payments), and  
6 I.C. § 6-1603 (prohibiting double recoveries from collateral sources).  
7 Finally, Washington has no limit on noneconomic damages while Idaho has  
8 a limit of \$250,000. I.C. § 6-1603.

9 Plaintiffs respond that these differences are not related to the  
10 underlying negligence giving rise to this action, but to an individual's  
11 ability to recover. The Court agrees that the states' conflicting legal  
12 concepts are related to an individual's ability to recover. However,  
13 Idaho's filing restriction on an individual who is more than 50 percent  
14 negligent is a significant restriction on not only the amount of recovery  
15 but *who* can recover. This is not a mere difference in damages.  
16 Therefore, there is at least one valid conflict of law issue. The Court  
17 moves on to Washington's two-pronged test to determine which state's law  
18 should apply.

19 C. Contacts

20 In evaluating the contacts to the underlying claim, it is clear that  
21 Idaho law governs the tort action of the case. The alleged wrongful death  
22 occurred at the Palouse Mall, which is located in Idaho. The conduct  
23 causing the fall, or the alleged negligence on the part of Macy's,  
24 occurred in Idaho. Also, the place where the relationship between the  
25 parties is centered is the Palouse Mall in Idaho. Accordingly, all of  
26 the factors, except domicile of the parties (Macy's: Ohio; decedent:  
Washington), favor Idaho as the state whose laws should be applied to

1 this tort claim. Because the contacts are not evenly balanced, there is  
2 no need to move on to step two of Washington's choice of law analysis.  
3 Idaho's tort laws govern the wrongful death claim.

4 **V. Conclusion**

5 As stated above, **IT IS HEREBY ORDERED:**

6 1) The Mall's Motion for Summary Judgment (1) Dismissing Macy's  
7 Breach of Contract Claim; and (2) Entering Judgment on Palouse Mall's  
8 CounterClaim (**Ct. Rec. 30**) is **GRANTED** (Macy's claim that the Mall  
9 breached paragraph 31.2 (indemnity)) **and DENIED IN PART** (remainder).

10 2) Macy's Motion to Strike Paragraphs and Exhibits to Declaration  
11 of Kim Impecoven (**Ct. Rec. 38**) is **GRANTED and DENIED IN PART**.

12 3) Macy's Motion for Order Determining Applicable State Law (**Ct.**  
13 **Rec. 62**) is **GRANTED**. Idaho tort law governs the wrongful death claim.

14 **IT IS SO ORDERED.** The District Court Executive is directed to enter  
15 this Order and forward copies to counsel.

16 **DATED** this 30th day of July 2010.

17  
18 s/Edward F. Shea  
19 EDWARD F. SHEA  
United States District Judge

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